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October 15, 2007

BY HAND

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COMMISSION
OFFICE OF GENERAL
COUNSEL

2007 OCT 16 A 10 34

Re: MUR 5935
Congresswoman Kirsten E. Gillibrand

Dear Ms Duncan

We are counsel to Congresswoman Kirsten E Gillibrand, the respondent in the above-referenced matter

This matter involves a lone fundraising invitation, sent without the Congresswoman's personal knowledge, seeking funds for a local candidate. The event in question was not held to raise "soft money." On information and belief, all contributions raised by the event came from federally permissible sources in amounts less than \$2,300. These facts do not support a finding that the Congresswoman herself violated the Bipartisan Campaign Reform Act of 2002.

DISCLAIMER

A. Factual Discussion

Congresswoman Gillibrand is a first-term Representative of New York's 20th Congressional District. She is a candidate for re-election, her principal campaign committee is Gillibrand for Congress ("the Committee"). In the off-year, the Committee employs a few individuals whose duties include responding to requests for political

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support in the district *See* Offinger Aff ¶ 1 Their duties, however, do not permit them to solicit or direct "soft money " *See id* ¶ 6

In summer 2007, the Committee's finance director, Ross Offinger, received one such request from Joseph Ruggiero's campaign for Dutchess County Representative *See* Offinger Aff ¶ 2 The Ruggiero campaign asked whether Congresswoman Gillibrand could attend a July 21, 2007 fundraiser for Mr Ruggiero *See id* The Ruggiero campaign also asked whether it could refer to the Congresswoman as a "special guest" on an invitation for the event *See id* ¶ 3 It provided a draft invitation to Mr Offinger for review *See id*

The invitation did not expressly ask for funds from any federally prohibited sources, it contained no reference to corporations or unions *See id* ¶ 3, *see also* Compl Attachment A The highest dollar amount indicated on the invitation was \$2,500, which exceeded the amount Congresswoman Gillibrand could accept from an individual for the 2008 primary election – but which was lower than the amount she could accept for the primary and general elections combined *See* Offinger Aff ¶ 3, Compl Attachment A *See also* 2 U S C § 441a(a)(1)(A)

Mr Offinger gave the invitation what he describes as a " cursory " review Offinger Aff ¶ 3 Not being familiar with the Commission's guidance in Advisory Opinion 2003-3 and subsequent opinions, and recognizing the \$2,500 dollar amount as being within the range of what the Congresswoman could solicit for her own campaign under certain circumstances, he told the Ruggiero campaign that they could distribute the invitation *See id* He did not provide a copy of the invitation to the Congresswoman *See id* ¶ 4 She neither reviewed nor approved the invitation prior to the event, nor did she solicit contributions herself in connection with the event *See id* ¶ 4

The event itself did not raise any "soft money " *See* Offinger Aff Tab A A list kept by the Ruggiero campaign contemporaneously with the event show that virtually all of the contributions were small-dollar checks from individuals, totaling little more than \$15,000 *See id* , *see also id* ¶ 5¹

¹ Only two contributions present issues as to amount or source a \$2,500 contribution from an individual named Joe Lambert, and a \$500 check issued by Medical Answering Services LLC *See* Offinger Aff Tab A As to the \$2,500 check, the Committee understands from the Ruggiero campaign that it was not raised by the event, but was raised directly by a member of the Host Committee at around the same time as the event, and was included on the list as a result As to the LLC check, the Committee lacks any information to suggest that the check was corporate *See*

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The Rhinebeck Republican Committee obtained a copy of the invitation. It filed the instant complaint, alleging that Congresswoman Gillibrand had illegally raised "soft money." See Compl at 1. The Commission named her alone as a respondent.

B. Legal Discussion

The Bipartisan Campaign Reform Act of 2002 allows federal officeholders and candidates to solicit funds for local candidates, so long as the funds do not exceed the amounts permitted with respect to federal candidates and political committees, and so long as they are not from sources prohibited from making contributions in connection with federal elections. See 2 U.S.C. § 4411(e)(1)(B). See also 11 C.F.R. § 300.62 (2007) (allowing solicitations of funds "in amounts and from sources that are consistent with State law, and that do not exceed the Act's contribution limits or come from prohibited sources under the Act").

Neither the Act nor Commission regulations require a disclaimer when a federal officeholder or candidate appears on a fundraising invitation for a local candidate. Twice, the Commission has been asked to write a disclaimer requirement into the regulations, and twice it has declined. See Definitions of "Solicit" and "Direct", 71 Fed. Reg. 13,926, 13,930 (2006), Candidate Solicitation at State, District, and Local Party Fundraising Events, 70 Fed. Reg. 37,649, 37,654 (2005).

What the Complaint characterizes as "a narrow set of restrictions," see Compl at 1, is actually a safe harbor that the Commission established through the advisory opinion process. See, e.g., Advisory Opinions 2003-3, 2003-5 and 2003-36.² The Commission gave examples of disclaimers that would prevent the officeholder from being held liable, if an event sponsor received "soft money" in response to an authorized solicitation. See Advisory Opinion 2003-3. But it did not say that a violation would automatically be found in the absence of a disclaimer – particularly when no "soft money" was accepted in response to the solicitation.

Treatment of Limited Liability Companies Under the Federal Election Campaign Act, 64 Fed. Reg. 37,397, 37,398 (1999) (asserting that "most LLCs" are taxed by the IRS as partnerships rather than as corporations). In any event, however, Congresswoman Gillibrand did not solicit either contribution. See Offinger Act § 4.

² "Where the law is of uncertain application, advisory opinions cannot be used as a sword of enforcement. The regulated community can, however, use advisory opinions as shields against Commission enforcement actions in appropriate circumstances." Statement of Reasons on the Audits of Dole for President Committee, Inc. (Primary), et al., June 24, 1999, available at <http://www/fec.gov/members/mason/masonstatement5.htm> (citation omitted).

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These facts do not present a BCRA violation by Congresswoman Gillibrand. She appeared on an invitation that ultimately raised only federally permissible funds. While it might have been advisable for her campaign to insist on the inclusion of a disclaimer, and while it would have spared her and the Commission the burden of having to respond to this complaint, she was not required to do that.

Even if the Commission were to find that the invitation was a prohibited solicitation, no further action would be warranted. All the facts demonstrate that the omission of a disclaimer was simply a mistake. Here, no one was trying to raise "soft money" while keeping the candidate ignorant of his activities. See Definitions of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures, 71 Fed Reg 4,975, 4,979 (2006). Rather, the campaign's employee was simply unfamiliar with the Cantor opinion. See Offinger Aff ¶ 3. Also, he saw the amounts shown on the invitation as consistent with those which federal candidates can raise as a practical matter. See *id*.

And even if one were to accept the Commission's premise that a candidate can be held liable for an employee's conduct – a premise which has yet to be tested in court – the facts do not support a finding against Congresswoman Gillibrand personally. Were candidates or officeholders to face the stigma of penalties – or even admonishment – for stray invitations sent in their name, the result would be exactly what the Commission seemed to fear when it last decided whether to write a disclaimer requirement into the rules. It "would 'chill' the activities of Federal candidates and officeholders at the State and local, or 'grassroots,' level." 71 Fed Reg at 13,930.

For the foregoing reasons, we respectfully request the Commission to dismiss the complaint, and take no further action.

Very truly yours,


Brian G Svoboda

Ezra W Reese

Counsel to Congresswoman Kirsten A Gillibrand

Enclosures

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